

## 1 UNITED STATES DISTRICT COURT

## 2 DISTRICT OF MINNESOTA

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5 In re: ) Civil 05-MD-1708 (DWF/AJB)  
6 )  
7 GUIDANT CORPORATION ) STATUS CONFERENCE  
8 IMPLANTABLE DEFIBRILLATOR )  
9 PRODUCTS LIABILITY )  
LITIGATION, )  
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10 This Document Relates )  
11 To All Actions ) 9:15 o'clock, a.m.  
12 ) May 17, 2006  
13 ) Minneapolis, Minnesota  
14 -----

15 BEFORE THE HONORABLE JUDGE DONOVAN W. FRANK AND  
16 THE HONORABLE MAGISTRATE JUDGE ARTHUR J. BOYLAN  
17 UNITED STATES DISTRICT COURT JUDGE AND MAGISTRATE JUDGE  
18 CIVIL STATUS CONFERENCE PROCEEDINGS  
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1 (In open court.)

2 THE HONORABLE JUDGE DONOVAN FRANK: Thank  
3 you. You may all be seated.

4 We are not sure what all of the festivities  
5 were out here before we came out, but we apologize for  
6 the late start. The lawyers were with us at 8:00 this  
7 morning, so there wasn't a late start on their end or  
8 our end.

9 There is a joint agenda set for today. That  
10 is also posted on the website. We try to get it on  
11 there as soon as possible, on the assumption that  
12 perhaps one or more of you who are here, in the event  
13 you have not been here before, we will go straight  
14 through the agenda. And then usually at the end, we  
15 will inquire as to whether anyone else has any other  
16 issues or anything that you want to place on the record.  
17 So, absent objection from either counsel for Guidant or  
18 for the Plaintiffs, we can proceed and go right down the  
19 list.

20 I will indicate for the record something I  
21 told the lawyers this morning, that I did talk to Judge  
22 Cleary, who is the State Judge in Ramsey County, who has  
23 been assigned by the Chief Judge there, Greg Johnson.

24 It makes Judge Boylan and I feel old,  
25 because these are all Judges who weren't there when we

1 left the State Court. So, we are in the old crew. But,  
2 he has been assigned by the Chief Judge there, and we  
3 have talked and he responded to the letter. I sent him  
4 the same individual letter, that is also on the website  
5 that the other State Judges in the country have  
6 received. His goal is to work with us, coordinate to  
7 the extent that he can do his job and manage his case  
8 load with our cases.

9 He is of the view that the Minnesota Supreme  
10 Court has not, one way or the other, made a decision on  
11 whether one judge should have all of the cases for the  
12 entire state. And most of those, if not all of them,  
13 would be Ramsey and Hennepin. And a judge has not been  
14 assigned by Chief Judge Lucy Wieland, there as of yet,  
15 and I have chatted with her. And I will chat with her  
16 again this week, because I haven't talked to her since I  
17 talked to Judge Cleary. Because he is of the view it  
18 would make most sense to have one, one judge for the  
19 State.

20 And actually, my conversation with him goes  
21 back nearly two weeks ago, now. And he also sent me, I  
22 thought, a very responsive letter to mine. And so, he  
23 may have actually met with some of the counsel on the  
24 cases that he has, because it has been probably ten days  
25 since I chatted with him. So, I will keep everyone

1 up-to-date. If there is anything we learn, we will pass  
2 it on.

3 I did have something I didn't mention this  
4 morning. We have had a number of requests -- I guess "a  
5 number," that might be a bit misleading. A number is  
6 probably under five, requests from individual  
7 Plaintiffs' lawyers, I think it would be safe to say,  
8 some cases where it has not been filed, some where there  
9 has no been no lawsuit initiated, who have called in  
10 either directly to my chambers, or via the Clerk's  
11 Office, and then directed again, asking, is it feasible  
12 for us to go on the website if we are not having -- we  
13 are not in the system, yet, and see names of all of the  
14 cases?

15 And so, we are actually going to put  
16 together a list by name, both file name and case name of  
17 all of the cases. I think actually it may be about  
18 done, now, and state or district of origin, and roll  
19 that out on the website.

20 I'm not sure whether the inquiry was so they  
21 could determine who they might contact, or if they were  
22 curious to see who in their state or in their area of  
23 the United States was involved. And actually, that is  
24 information you can get if you are in the system without  
25 going on our website. But, we will roll that out. For

1 those of you probably here, you already have access to  
2 that through ECF. We will put it on to our website.

3 With that, we can begin, unless there is  
4 something either on behalf of the Plaintiffs or the  
5 Defendants that you wish to state, we can proceed right  
6 on through the agenda.

7 MR. ZIMMERMAN: Thank you, Your Honor.  
8 Charles Zimmerman on behalf of the PSC.

9 The agenda is before the Court. And the  
10 first item is number and status of cases transferred  
11 into the MDL. And I think Mr. Pratt maybe has those  
12 statistics a little more accurate than I.

13 THE HONORABLE JUDGE DONOVAN FRANK: Now,  
14 have you retained Mr. Pratt to be the statistician on  
15 these items?

16 MR. ZIMMERMAN: Yes, yes, yes. The fee has  
17 not been negotiated, however.

18 MR. PRATT: Yes, I majored in precalculus in  
19 1967.

20 In terms of the cases that are now pending in  
21 the MDL and otherwise, the current status is there are  
22 250 cases here and now in the Federal MDL, CT-011 was  
23 just entered yesterday, so that kind of swept in some  
24 additional cases.

25 Pending transfer are 24 cases before the

1 Judicial Panel. Only four of those have objections  
2 lodged to them. So, we will get, you know, clearly 20  
3 of those cases without objection. Four will have to be  
4 resolved by the Judicial Panel. And that takes care of  
5 the federal situation. They are not all PRIZM 2, Model  
6 1861 cases, they are sort of a smattering of different  
7 cases of these 252 now pending.

8           There are 20 State Court cases, and by that I  
9 mean cases that are fairly firmly lodged by now in State  
10 Court. There are some that may be removed in addition  
11 to that, but in terms of the number 20, it represents  
12 cases that have either been remanded, some by Your  
13 Honor, or we have stipulated that they may be remanded  
14 subject to the Court's order.

15           THE HONORABLE JUDGE DONOVAN FRANK: I have  
16 got a couple of those on my desk, now, I think with Ms.  
17 Pearson.

18           MR. PRATT: Yes. So, we are not quarrelling  
19 with that. So, there are 20 of them probably pretty  
20 well stuck in State Court right now. Stuck, my word,  
21 maybe not the Plaintiff's counsel in that case. And  
22 they are sort of scattered by -- there are eight of them  
23 in Minnesota, there are six of them in Texas, and then  
24 there are six of them sort of scattered in various  
25 states around the country. So, that will give you some

1 idea of kind of how they are spread around. So, eight,  
2 six and six, to get to 20.

3 MR. ZIMMERMAN: He will be re-upped for next  
4 month on this, as well, too.

5 Discovery status, I am going to ask Richard  
6 Arsenault of the Lead Counsel Committee to give us a  
7 report on the depositions and the discovery that is in  
8 play at the present time.

9 MR. ARSENAULT: Good morning, Your Honor.  
10 It's Richard Arsenault, Lead Counsel Committee. Very  
11 briefly, with regard to the third-party subpoenas, we  
12 have 18 subpoenas that have been issued, 13 of those are  
13 served as we speak. Five are currently in the process  
14 of being served. There were some address issues and  
15 some service issues.

16 The documents will be starting to come in on  
17 some of those. And, of course, there are some  
18 objections that we are attempting to amicably resolve.  
19 In the event we don't, we will probably have to tee up  
20 some motion practice in connection with that.

21 With regard to the depositions, there are two  
22 30(b)6 depositions that have been concluded. Those were  
23 on document management and warranties. There was a  
24 third 30(b)6 deposition that was begun a day or so, was  
25 concluded on medical advisories, and that is going to be

1 concluded, now, on June 6th.

2 We had two other depositions that were  
3 concluded, Rocco Russini and Dr. Beverly Laurel.

4 As we speak, those are the most urgent in  
5 terms of the next few weeks. We have four depositions  
6 in play, that is Dan Tisch, Alan Gorsette, concluding  
7 the medical advisory 30(b)6 that we just talked about.  
8 And lastly, a 30(b)6 with regard to communications with  
9 regulatory agencies.

10 We understand that a Mr. Chris Harold is  
11 going to be put up in connection with that. And part of  
12 what we were doing moments ago before Your Honors came  
13 in was try to reach an agreement with regard to the  
14 amount of time that would be allotted for that  
15 deposition. We have now reached an agreement with  
16 regard to that.

17 And then, Your Honors, we have eight other  
18 depositions that are currently scheduled, or at least  
19 tentatively noticed for June. We are trying to work out  
20 those dates based on what happens with the four that are  
21 going to take place before those eight. And we will  
22 continue to keep Your Honors posted on our progress.  
23 Thank you.

24 THE HONORABLE JUDGE DONOVAN FRANK: Mr.  
25 Pratt?

1                   MR. PRATT: To show how amicable we are, the  
2 discussion of Chris Harold's Deposition of just moments  
3 ago in chambers, we have worked out an arrangement that  
4 he will be available for two days, the focus would be on  
5 the 1861.

6                   By 3:00 on the second day, the Plaintiffs'  
7 Steering Committee representative will finish their  
8 questioning with respect to Mr. Harold. We then will  
9 have an opportunity to do a direct examination, if we  
10 need it. I could be fluid. If we don't need it, we  
11 could sort of move it around, but that is the agreement  
12 we have with respect to the Plaintiffs' Steering  
13 Committee.

14                  THE HONORABLE JUDGE DONOVAN FRANK: And he is  
15 actually related to the preemption issue, and we will  
16 just touch on that as we go down the list, here, before  
17 we are done. That will affect, in part, the briefing  
18 schedule for the motion I am going to hear. So, we can  
19 sit on that and take it up before we are done. Mr.  
20 Zimmerman?

21                  MR. ZIMMERMAN: Yes. The next issue, Your  
22 Honor, is the Defendant fact sheet. We didn't have an  
23 opportunity to discuss this in chambers. So, I guess I  
24 would like to say to counsel and the Court that we have  
25 one -- it is kind of languished, and we really need to

1 get this defendant fact sheet resolved. One issue has  
2 separated us that just appeared to us, and we have a  
3 letter to go to the Court on this issue with regard to  
4 the agreement as to what the information contained in  
5 the Defendant fact sheet should be, rather than really  
6 springing it here and now from the podium, I think what  
7 we will do is we will have another meet and confer. And  
8 if we don't have this resolved in a very short period of  
9 time, we would like to come before Your Honor maybe at  
10 the two-week interval and have this call made by the  
11 Court. Because we do have to have the Defendant fact  
12 sheets up and running and out the door and into the  
13 hands as an agreed document or court-ordered document.

14 But, there is one item in it that separates  
15 us, and I thank rather than springing it now, and having  
16 the debate now, we should meet and confer on it if that  
17 is agreeable to Your Honors.

18 THE HONORABLE JUDGE DONOVAN FRANK: All  
19 right. Mr. Pratt?

20 MR. PRATT: I don't like to be sprung upon,  
21 so I'm not sure what they are talking about. I don't  
22 want to be sprung upon. We will talk about it and try  
23 to resolve it. If we can't, this schedule is fine to  
24 resolve it in the two-week conference call.

25 MR. ZIMMERMAN: All right. A stay pending

1 transfers to the MDL is the next item, Your Honor. Or  
2 excuse me, a representative trial process update. We  
3 spent some time in chambers trying to resolve the  
4 differences that exist between us in the nomination  
5 cases by the Plaintiffs to the representative trial  
6 process. And I think we are fully vented on that issue,  
7 and that there's some issues that are now before the  
8 Court.

9 The goal here, as everyone knows is to come  
10 up with good representative cases in certain categories  
11 that basically have been agreed to.

12 There are some issues that we are trying to  
13 resolve. We made a lot of progress discussing them with  
14 Your Honor and amongst ourselves. I think the bottom  
15 line is that the Court is going to have to make a call  
16 and we understand will issue an order to help us define  
17 the nomination process for the Plaintiffs that is left  
18 to be done. We have nominated 10. We have to nominate  
19 another 10.

20 When we nominate the cases, we have to  
21 provide information, including fully filled out  
22 plaintiff fact sheets and all of the medical records  
23 that we have, or that the plaintiffs lawyers have, then  
24 the defendants are going to nominate ten, and then we  
25 would begin a strike process, where each side will then

1 have an equal number of strikes.

2 We have not nominated the second ten, because  
3 we are asking for some accommodation from the Defense.  
4 And if not coming from the Defense, from the Court. And  
5 once we hear the Order of the Court on what could be  
6 contained within the next ten, in other words what the  
7 deadline for the filing date of that next ten, we will  
8 then nominate the next ten, and in short order the  
9 Defendants will, I believe, have a short period of time  
10 to make their nominations.

11 I don't know if we want to go into any  
12 further specifics on this, Your Honor, until we get the  
13 directions from the Court on our next move. If you  
14 would like further discussion on it, I can certainly  
15 provide it. But until we get the direction from the  
16 Court on what the deadline is for the next 10, I guess  
17 it isn't worthy of any further discussion.

18 THE HONORABLE JUDGE DONOVAN FRANK: Mr.  
19 Pratt, anything?

20 MR. PRATT: I don't think we have much more  
21 to add on this subject of bellwether trials, Your Honor.  
22 As we mentioned, it is critical for us to get  
23 information, completed fact sheets, medical records on  
24 the Plaintiffs in play in the 1861 population. We have  
25 a few gripes about that. We talked to Your Honor about

1     it. I think what we have discussed this morning fairly  
2     represents what we have to say on the subject.

3                 THE HONORABLE JUDGE DONOVAN FRANK: Let me  
4     make a brief observation, and I don't know if Judge  
5     Boylan will have any additional.

6                 We will roll an order, short order out in the  
7     next couple of days. Of course, apart from who all gets  
8     it, it will go on the website. I think the important  
9     things to observe is that there will be no substantial  
10    changes. There are no substantial disagreements. But,  
11    important observations, I guess, from the Court's point  
12    of view is: One, nothing that we will do will tamper  
13    with the trial dates in March of 2007. Those we will  
14    stand firm on. And I think it is important to note that  
15    we are not hearing -- any issue that had been raised  
16    with us has not resulted -- it has never been suggested  
17    that there is going to be any attempt to tamper with  
18    those, because we are firm with those dates. And we  
19    will set aside the time to try the cases.

20                We will also address the Plaintiffs' fact  
21    sheets, frankly, in the order it was filed. It was not  
22    contemplated there would be any hesitation or any  
23    objections because that order, with the exception of a  
24    paragraph or two, were stipulated to. And whether that  
25    is the case or not, a couple of decisions were made by

1 the Court.

2 The risk, I think that both party's run is if  
3 there is not a full flow of information on these cases,  
4 it could effect the selection process, because if this  
5 information isn't flowing between the parties, some of  
6 those cases are going to fall off as potential  
7 representative cases.

8 But, I think in large part, once we just  
9 modify some dates and address any issues, there won't be  
10 any substantial changes. And it is not going to  
11 effect -- it will not effect the dates that we have in  
12 play for other deadlines, including the trials. And I  
13 don't know if Judge Boylan, if you had anything further  
14 to say --

15 THE HONORABLE MAGISTRATE JUDGE BOYLAN: No.

16 THE HONORABLE JUDGE DONOVAN FRANK: Because  
17 it remains to be seen what role, proper role that one or  
18 both of us will play, either if requested, or perhaps if  
19 not requested, once you tee up the 20 cases on what help  
20 the Court can be in picking the appropriate cases, but  
21 we will approach that -- it is better left for another  
22 day.

23 So, unless something that we have said has  
24 raised another issue with either counsel, or if there is  
25 something else you need to say, I think what will happen

1 is we will roll an order out addressing any unresolved  
2 issues, re-establishing some of these deadlines in light  
3 of the selection process, because we did discuss how  
4 much time each of you would need if we rolled out all of  
5 the information. That presupposes all of the  
6 information is coming with the nominated cases, how much  
7 time Guidant will need to respond.

8           So, I think we will have this all well in  
9 hand in the next couple of weeks. So, unless there is  
10 anything else on that issue, we will roll out a short  
11 order. It may or may not be a separate order if there's  
12 any unresolved issues on the rest of this agenda, we may  
13 roll it all into the next sequence of a pretrial order.  
14 But, we will resolve it immediately. So, Mr. Zimmerman?

15           MR. ZIMMERMAN: Thank you, Your Honor. And  
16 we are all very committed to making the process work.  
17 The whole idea is to make it such that we get meaningful  
18 information from these representative trials. And I  
19 know both sides are committed, as well as the Court in  
20 making this work, and we are just working the process as  
21 hard as we can.

22           The next issue is the stays pending transfer  
23 to MDL. I think it is a very technical issue, which is  
24 almost beyond my understanding. But, you know, what do  
25 I know? Apparently, answers could be due while the case

1 is still pending transfer in the MDL. And Defendants  
2 want to make sure we don't take a default judgment. And  
3 we refuse, we wanted to -- no. We understand that there  
4 is this delay, and we agree to a stay of the answer date  
5 while the case is pending transfer to the MDL. So, it  
6 is not a disputed item at all, and it only makes sense,  
7 given the administration of MDL's and how the cases get  
8 transferred to this Court. So, I don't think it is a  
9 disputed issue of any kind and we will simply agree  
10 to --

11 MR. PRATT: This is a technical issue beyond  
12 by ability to comprehend, as well. I do understand we  
13 have an agreement on it, do we not?

14 MR. CARPENTER: Yes, we do.

15 MR. PRATT: So, I don't think it is a matter  
16 of dispute. We have worked out an arrangement that  
17 doesn't necessarily involve Your Honors.

18 THE HONORABLE MAGISTRATE JUDGE BOYLAN: I  
19 wonder if you should supply the Court with a proposed  
20 order?

21 MR. PRATT: Okay.

22 THE HONORABLE MAGISTRATE JUDGE BOYLAN: I  
23 think it is important enough that we would like to see  
24 that.

25 MR. PRATT: Sure, sure.

1                   THE HONORABLE JUDGE DONOVAN FRANK: And then  
2 I will add, maybe it is not needed for the folks in the  
3 courtroom, but -- well, maybe it is, as well, so it is  
4 crystal clear what has been agreed to. I don't think  
5 there will be any inadvertent waiver of anything. But,  
6 maybe we could put that out on the web, as well.

7                   MR. ZIMMERMAN: The next item, Your Honor, is  
8 the master complaint response. And I believe there is a  
9 proposed order that was attached to the agenda which  
10 provides a proposed order saying that the Defendants'  
11 response to the Plaintiffs' Master Complaint shall be  
12 filed on or before Monday, June 26th of 2006. And I  
13 believe that is an agreement from counsel that we just  
14 are awaiting the Court's approval and signature and  
15 entry.

16                  MR. PRATT: That is correct, Your Honor.

17                  THE HONORABLE JUDGE DONOVAN FRANK: All  
18 right, we'll move on.

19                  MR. ZIMMERMAN: The next item, Your Honor, is  
20 the proposed short form complaint, that is the complaint  
21 by adoption. We have two attachments. One is a PDF  
22 form, and the other is a WORD form. Then there is a  
23 proposed order allowing for these forms.

24                  And what this really is, Your Honor, it is  
25 just a system whereby we have uniformity in the

1 complaint, and it is a check-off complaint that allows  
2 all eyeballs to see the same thing at the same time. It  
3 is just a uniform system. If someone wants to adopt it,  
4 and we hope they do, the people who are filing new  
5 cases, to have a check-off form of complaint so they can  
6 tell the Court what their claims are in a check-off way  
7 so that we can keep them better organized and understand  
8 what the complaints are, what the claims are and where  
9 they come from.

10 It is not controversial. I know the  
11 Defendants have no objection to it. We just ask that  
12 the Attachment D, which is the proposed order adopting  
13 these forms be entered so the forms can be downloaded  
14 off the website and used for the filing of subsequent  
15 complaints in these proceedings.

16 MR. PRATT: This is fairly standard in MDL's  
17 and I think it makes it easy for everybody. So, we  
18 agree with the short-form complaint.

19 THE HONORABLE JUDGE DONOVAN FRANK: All  
20 right.

21 MR. ZIMMERMAN: Plaintiff fact sheets, Motion  
22 to Dismiss, is the next item, Your Honor. I do want to  
23 report something to the Court, and that is that the PSC  
24 has taken a very proactive role in making sure that  
25 there is compliance with the requirement of a Plaintiff

1 fact sheet.

2 We stand before the Court having negotiated  
3 the Plaintiff fact sheets with the Defendants and sought  
4 the approval of the Court, letting the Court know that  
5 when a Plaintiff files a Complaint, it is their  
6 obligation to timely file a Plaintiff fact sheet. And  
7 these time limits are set out in court orders. And that  
8 is supposed to happen as a matter of course.

9 If it doesn't happen, the Plaintiffs'  
10 Steering Committee will take action to contact  
11 Plaintiffs' lawyers, once we know they haven't complied  
12 with the Plaintiff fact sheet requirement, and remind  
13 them of this obligation. And then what normally seems  
14 to occur, or has occurred, is the Defendants will file a  
15 motion basically to dismiss the claim for failure to  
16 file a Plaintiff fact sheet. At which point we then  
17 contact personally, not just by letter or e-mail, but we  
18 actually call up the Plaintiff's law firm and lawyer and  
19 say, you know, you are going to have your case dismissed  
20 unless you comply with the order to complete and  
21 substantially and appropriately complete the Plaintiff's  
22 fact sheet. And we have been running that process for  
23 some time, now, ever since this issue became very  
24 critical, as the critical mass in the case have grown.

25 On April 21st, Your Honor, when we were

1 notified by Defense counsel, there was a list of 58  
2 cases in this MDL that had not filed appropriate  
3 Plaintiff fact sheets. We then did what I just said we  
4 were going to do. We contacted them. We e-mailed,  
5 faxed letters, and made personal contacts, depending  
6 upon the level of cooperation.

7 And as we sit here today, less than one month  
8 later, there are only 17 cases that we understand do  
9 not -- have not been in compliance with the Plaintiff  
10 fact sheets. So, we have really gotten 41 cases into  
11 compliance.

12 THE HONORABLE JUDGE DONOVAN FRANK: Now, but  
13 when you say in compliance, there is a separate issue on  
14 deficient --

15 MR. ZIMMERMAN: Correct.

16 THE HONORABLE JUDGE DONOVAN FRANK: --  
17 deficient fact sheets that have been submitted.

18 MR. ZIMMERMAN: And that is the second part  
19 of this. Getting them in and getting them substantially  
20 compliant is the first part. Then the Defendants will  
21 take a look at them and say, well, they are deficient  
22 because A, B and C wasn't done appropriately. Some of  
23 these are major defects, and some are very minor.

24 Maybe there is a signature missing or the  
25 name of a doctor where you are supposed to have a

1 doctor's name and address, they can only give the  
2 doctor's name, because they don't know the address, or  
3 something. They vary, and I don't want to classify  
4 these as major, minor, at this point make any judgment  
5 about the completion of these forms. But, if -- the  
6 second part of it is to make sure they are completed  
7 appropriately, but the first part is to make sure they  
8 get in. And we have made good progress on that. And I  
9 think as we sit here today, there are only 17 cases that  
10 have not complied.

11 And it is my understanding that people have  
12 said in three of those cases, they are not going to  
13 bring them into compliance. In fact, they are going to  
14 dismiss their cases, which leaves, I believe, 14 cases  
15 that could be subject to an appropriate motion if they  
16 are not in compliance at the time the motion is made.

17 This is an important issue to everybody.  
18 But, from the Plaintiff's point of view, we believe --  
19 our job as the Lead Counsel Committee and the Plaintiffs  
20 Steering Committee is to tell people they are out of  
21 compliance, if they are, and encourage them to become in  
22 compliance.

23 It is the Plaintiffs lawyer's case who has  
24 the individual case to drive the compliance and to make  
25 them timely and to comply with the completion of the

1 form appropriately. But, what we are doing is making  
2 sure that everybody understands, these are critical  
3 deadline. They must be done. Your case will be  
4 dismissed if they aren't properly done. That is our  
5 task, and that is what we have undertaken. And I have  
6 told the defense that we would do so. All they needed  
7 to do was contact us and tell us who had not  
8 appropriately filed, and we would take action to make  
9 sure that at least we could do everything humanly  
10 possible on our side to get them to be in compliance and  
11 file the appropriate Plaintiff fact sheets.

12 The second round will be if we get to the  
13 point where they say there are defects within the  
14 completed fact sheets. And again, we will deal with  
15 them on that in an effort to make sure that everyone has  
16 the opportunity to cure, as opposed to receive a sua  
17 sponte, or a dismissal that occurs because they did  
18 something that wasn't compliant with the appropriate  
19 filling out of the fact sheet.

20 We want to make sure everyone has due  
21 process. We want to make sure that complaints are not  
22 dismissed willy-nilly; but, again, if people don't after  
23 appropriate coaxing get these Plaintiff fact sheets in,  
24 the Court has the authority under the agreements to  
25 dismiss the Complaint if they aren't compliant with the

1 Plaintiff fact sheet requirements.

2 THE HONORABLE JUDGE DONOVAN FRANK: One  
3 thing I would note that isn't apparent on the website is  
4 just to kind of confirm some of the -- how all of the  
5 numbers have gone down, because I do have that large  
6 stack of Motions to Dismiss on my desk back in chambers.

7 However, Guidant -- I'm not sure who, who  
8 contacted me. They had contacted me some time ago,  
9 which I think will just confirm that there is a good  
10 level of communication between counsel, although we  
11 didn't call you, and the request was: Can we just,  
12 rather than just file a motion to withdraw or motion to  
13 withdraw this motion, if we send you a letter confirming  
14 that we want to withdraw the -- that we'll withdraw the  
15 motion because we have the fact sheet now, will that  
16 suffice. And so, the answer, of course, by us was yes.  
17 And so, we are honoring -- when a letter comes in, we  
18 don't go through the full process. We take the letter  
19 and we grant those. So, I think it just expedites the  
20 process, saves some time.

21 MR. ZIMMERMAN: Right. And we are working on  
22 levels of cooperation to make this happen expeditiously  
23 and appropriately. We want to guard against  
24 inappropriate dismissals or dismissals that are  
25 inadvertent. And I know the Defense wants to make sure

1     that the cases that are not compliant have the right to  
2     be dismissed. So, we are working this through, and I  
3     think we have got a mechanism now in place where we can  
4     communicate on this level and do everything we can to  
5     bring everything into compliance, if humanly possible.

6                 THE HONORABLE JUDGE DONOVAN FRANK: Mr.  
7     Pratt, do you want to get in on this?

8                 MR. PRATT: Just for a second. Mr.  
9     Zimmerman's comments went a bit beyond the agenda item.  
10    The agenda item really deals with the motions to  
11    dismiss. I am not faulting him for that, but focusing  
12    on the motions to dismiss.

13                I mean, this problem came about because over  
14    two months ago, in an order, you required the Plaintiffs  
15    to provide Plaintiffs fact sheets as of March 3rd. And  
16    here we are now into May, middle of May, and still don't  
17    have fact sheets from some of the Plaintiffs.

18                So, what we did was to file on the Defense  
19    side, we alerted the Court to this, 26 motions to  
20    dismiss, largely in instances where we had no fact  
21    sheets, whatsoever. In the wake of that, we got calls  
22    from Plaintiffs' counsel saying, we didn't know we were  
23    supposed to do it. We missed it, we were busy, sorry,  
24    will you withdraw the motion? And we said, get us the  
25    fact sheet and we will withdraw the motion. So, that is

1 what we had done. We told you we would work with the  
2 Plaintiffs' counsel on that.

3 As of right now, though, according to the  
4 latest count I have been able to come up with, we have  
5 16 motions to dismiss, still pending, for which there  
6 are no fact sheets that have been offered or provided to  
7 us. So, this agenda item simply sets out a schedule for  
8 those 16 motions to dismiss. These Plaintiffs' counsel  
9 need to know that if you are going to object to the  
10 motion to dismiss, you need to do it no later than June  
11 1.

12 And if you do it, we will reply by June 8th,  
13 and then we can set it up for the next MDL conference.  
14 To the extent we need to argue it, it is now set, I  
15 think, for June 21. That is what we are doing on the  
16 motion to dismiss side. There are still a lot of issues  
17 over some of the deficiencies, we meeting and conferring  
18 and talking and doing everything we can to try to get  
19 complete information on the Plaintiff fact sheet.

20 I think there is an agenda item on the  
21 proposed order where Plaintiffs cannot object to  
22 portions of the Plaintiff fact sheet, but this agenda  
23 item 8 simply deals with the schedule for dealing with  
24 the pending remaining motions to dismiss, not so much  
25 with our continued efforts to get everything we can from

1 the Plaintiffs on their incomplete fact sheets.

2 MR. BECNEL: Judge, may I address something?

3 THE HONORABLE JUDGE DONOVAN FRANK: All  
4 right.

5 MR. BECNEL: Only because, as you know, along  
6 the Gulf Coast and all the way to Texas.

7 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Why  
8 don't you identify yourself?

9 MR. BECNEL: I'm sorry, Daniel Becnel. I  
10 would like to address the Court concerning medical  
11 records, especially when you have petitions.

12 Most of the hospitals in Metropolitan New  
13 Orleans and all along the Mississippi Coast throughout  
14 Alabama, I believe, were destroyed, including their  
15 records, the doctors have all moved all over the place.  
16 And mail service, for example, in New Orleans only  
17 resumed three weeks ago. And you have to come to the  
18 Main Post Office to get your mail, because you can't get  
19 them -- and FEMA threw most of the people out of hotels  
20 and stuff as of two weeks ago.

21 So, there is a transition of contacting  
22 people that exist among that area. I just want to alert  
23 the Court, because of due process, there may be problems  
24 where I have a case, a referral lawyer referred it to  
25 me. The person has the device card in his hip pocket,

1 but that is about all he has got. He can't get -- for  
2 example, in New Orleans 40 percent of all of the people  
3 were served by the Charity Hospital. It is nonexistent.  
4 They have no records. They have nothing.

5 THE HONORABLE MAGISTRATE JUDGE BOYLAN: There  
6 is no reason why you couldn't get a signed authorization  
7 to release medical records to the Plaintiffs, and as  
8 much information as you have available from the clients,  
9 and I guess that is the real question. We want to make  
10 sure that as much information is given so that both  
11 sides are looking at the same thing when this bellwether  
12 process is undertaken.

13 MR. BECNEL: Absolutely. And we are having  
14 this problem, not just in this case, but all cases  
15 dealing with these mass torts right now, because you are  
16 just stuck. And it is not the client's fault. And most  
17 of the doctors, for example, in New Orleans, 4,500 of  
18 them have left and have never returned. We don't know  
19 where they are.

20 And they have no records to give to the  
21 patient to even be able to help them out. So, I just  
22 wanted to alert Mr. Pratt to that. Unless you are in  
23 that area, you don't know that. And there is no mail  
24 service. Last week sewage and water was restored to  
25 about 40 percent of the city. And so, that is what we

1 are dealing with. I don't want him to think that  
2 lawyers are not trying to comply or even that clients  
3 are not trying to comply. But, if you look at USA  
4 Today, you will get in a front page article a little bit  
5 of what is going on there today.

6 THE HONORABLE JUDGE DONOVAN FRANK: Okay,  
7 thank you.

8 MR. ZIMMERMAN: And there is no question,  
9 everybody is wholly empathetic with what is going on in  
10 the Gulf Coast. And if at any time that is the reason  
11 for the problem, I am sure the Court and both sides will  
12 be very, very cognizant and take that into due  
13 consideration as we have in other cases.

14 And the Baycol experience shows we gave extra  
15 time when people needed it to do things. And certainly,  
16 we would be willing to entertain those requests in these  
17 proceedings.

18 Plaintiff fact sheet objections, is that  
19 really different than the motions? Or did I cover that  
20 by saying more than I should have last time on the  
21 agenda item? I think we kind of covered it.

22 MR. PRATT: I think we did talk about that  
23 briefly this morning from the standpoint of asking the  
24 Court to sort of get involved in telling people they  
25 can't object or refuse to provide information that is

1 required by the Court-approved Plaintiff fact sheets.  
2 So, really, it relates to that issue.

3 THE HONORABLE JUDGE DONOVAN FRANK: And we  
4 will address that, along with any, for lack of a better  
5 interpretation, loose ends on the bellwether exchange,  
6 and submissions. I thought it was clear before, but we  
7 will make sure it is.

8 MR. PRATT: And then just for point of  
9 reference, in our statement of disputed facts for this  
10 MDL hearing, we attached a proposed order dealing with  
11 that.

12 THE HONORABLE JUDGE DONOVAN FRANK: Right,  
13 and I acknowledged that.

14 MR. ZIMMERMAN: Deposition protocol,  
15 potential amendments. I'm not sure what that issue is.

16 THE HONORABLE MAGISTRATE JUDGE BOYLAN: I  
17 think we agreed --

18 MR. ZIMMERMAN: To meet and confer on that, I  
19 think.

20 THE HONORABLE MAGISTRATE JUDGE BOYLAN: To  
21 talk in the next telephone conference.

22 MR. ZIMMERMAN: This has got to do with the  
23 cross-noticing and the sharing of time, as I understand  
24 it. Okay.

25 THE HONORABLE JUDGE DONOVAN FRANK: Are there

1 other issues that we didn't discuss?

2 MR. PRATT: Well, how much time do they get  
3 for the three people who've composed the tests?

4 MR. ZIMMERMAN: Yeah.

5 MR. PRATT: Nobody here knows, Bucky.

6 MR. ZIMMERMAN: Okay.

7 THE HONORABLE JUDGE DONOVAN FRANK: Well,  
8 maybe you can just, in a couple of minutes or less,  
9 because I see a few lawyers out in the audience shaking  
10 their heads like, what are they talking about?

11 MR. PRATT: Sure. I'm sorry. And there was  
12 some confusion. We did talk about both things that Mr.  
13 Zimmerman talked about in this issue. And it relates to  
14 the fact that in the Texas cases there were three  
15 company witnesses who were deposed 4 or 5 to 6 hours,  
16 each one of the three of them. Some of them are coming  
17 up for MDL depositions.

18 Our position is on the Defense side that  
19 there ought to be some limit as to topics they are  
20 allowed to cover in the MDL deposition, and time they  
21 are allowed to question the witnesses who have already  
22 been deposed. So, there is a seven-hour limit that the  
23 Court imposed in the original deposition protocol. Our  
24 position is that they ought to be limited to four hours  
25 of questioning of these three witnesses on

1 nonduplicative topics and questions. We have resolved  
2 to try to work out our differences in that regard, to  
3 reach an agreement with the Plaintiffs Steering  
4 Committee, both in terms of trying to limit time in  
5 topics. If we can't agree, we have agreed to get Judge  
6 Boylan involved to break the tie.

7 THE HONORABLE JUDGE DONOVAN FRANK: And you  
8 also, in your proposed order, I suppose it is implied,  
9 requested something. I suspect what Plaintiffs' counsel  
10 are going to say they do, anyway, and that is whoever is  
11 lead or co-lead counsel on the depositions have familiarized  
12 themselves with the deposition that was previously taken  
13 of the same witness so the same questions aren't asked  
14 the same way of the same witness.

15 MR. PRATT: Yes, and that is fairly standard.  
16 I think we have talked about this in our submission to  
17 the Court that I don't think anybody wants to do, you  
18 know, questioning of witnesses. The question is, what  
19 is the scope of that, what topics have been covered  
20 satisfactorily, and how much time did they get. I think  
21 we will be able to work out some agreement with them.  
22 We are only dealing with three witnesses, by the way,  
23 McCoy, Gorsette and Smith. Mr. Gorsette is up for  
24 deposition pretty quickly, so his is the most critical  
25 decision to make. So, we have that.

1           And Mr. Zimmerman was talking about the issue  
2 of cross-noticing depositions in the State Court cases,  
3 which is what we were doing. Dawn Barrios is the person  
4 who has been designated to be sort of the State Court  
5 coordinator liaison. We are working with Ms. Barrios in  
6 terms of having her work with the Plaintiffs' counsel  
7 and the State Court cases. Sometimes there is a Motion  
8 to Quash, but we are working on those kinds of issues to  
9 give them advance notice, to get the process done. We  
10 haven't resolved the issue of what happens if a  
11 Plaintiffs' lawyer from a State Court proceeding wants  
12 to come in to take time at a deposition of an MDL  
13 witness.

14           Our position will be that it is pretty clear  
15 who can participate in the questioning of MDL witnesses,  
16 but that is really not an issue that has even been  
17 raised to this point yet. So, if it is, we will try to  
18 resolve it. If we can't, we will talk to you all about  
19 it.

20           MR. ZIMMERMAN: The next item, Your Honors,  
21 are the device testing protocol and there's a proposed  
22 order, Attachment F, and FA. This was months in the  
23 making, but I think we have it. So, we submit it to  
24 Your Honors for your approval. And this has to do,  
25 obviously, with the testing regarding devices in

1 Plaintiffs' possession.

2 I don't know that it is necessary for any  
3 further explanation or argument. We have reached an  
4 agreement on this and we simply ask that it be reviewed  
5 by the Court --

6 THE HONORABLE JUDGE DONOVAN FRANK: I  
7 believe, Lowell, correct me if I am wrong, I believe  
8 that when we put the agenda out, I think we rolled all  
9 of this stuff out onto the website earlier.

10 THE CLERK: It was all one document.

11 THE HONORABLE JUDGE DONOVAN FRANK: We have  
12 rolled it all out onto the website.

13 MR. ZIMMERMAN: So, it is all there.

14 THE HONORABLE JUDGE DONOVAN FRANK: So, it is  
15 all out there. Correct.

16 (Discussion off the record.)

17 MR. PRATT: Just from the standpoint of  
18 people that may not know what that agenda item deals  
19 with, it relates to the fact that there are some  
20 Plaintiffs' lawyers around the country who have devices,  
21 either actual possession of devices or constructive  
22 possession of devices.

23 We want to be able to get access to those  
24 devices to do an evaluation of them. So, through this  
25 process, and Mr. Zimmerman is right, it actually was an

1 arduous and time-consuming process.

2           This is the order we ended up with. It sets  
3 out sort of a staging process for them to give us access  
4 to devices in the various categories of cases, so we can  
5 do an evaluation, to gather information they have from  
6 their own investigation in the evaluation of those  
7 devices. So, I think it is a critical order, actually.

8           I think it gives us the critical information  
9 we need for not just the bellwether process, but for  
10 sort of taking a look at all of the case that are here  
11 before the MDL. So, I think it is a good order.

12           THE HONORABLE JUDGE DONOVAN FRANK: And for  
13 the lawyers or other individuals in the courtroom, this  
14 order that has been identified thus far as a proposed  
15 pretrial order, it is on the website. And obviously,  
16 the signed version will go on, shortly. But, if you  
17 haven't seen it, it is on the -- any proposed order that  
18 has been discussed this morning by agreement, or  
19 actually any submission that was made this time around  
20 by Plaintiffs or Defendants, if it came in in one  
21 package, we put it all on to the Court's website.

22           THE CLERK: It is all under the agenda  
23 designation on the website.

24           MR. ZIMMERMAN: Thank you. The next item,  
25 Your Honor, is the preemption summary judgment motion

1 response date. And although I don't think we discussed  
2 that specifically, do we have a response date agreed  
3 upon?

4 THE HONORABLE JUDGE DONOVAN FRANK: We did  
5 indirectly, I think.

6 MR. ZIMMERMAN: Or were we going to meet and  
7 confer on that?

8 MR. PRATT: I think what we are doing to do  
9 is to probably reach an agreement. It is sort of keyed  
10 to Mr. Harold's deposition. They have maintained they  
11 want to get that done. I don't know that we have firmly  
12 agreed on dates for Mr. Harold's deposition, but I think  
13 the notion is that once that is completed, they will  
14 have a week after that to file their response. So, I  
15 think we will be able to work that out by agreement.

16 THE HONORABLE JUDGE DONOVAN FRANK: What I  
17 have said is, if you can't work the date out, we can set  
18 it. I suspect you will work that out, we will back that  
19 off, and then once we get those submission dates -- I  
20 mean, I am going into this until something seems that we  
21 ought to go do something different, or was going to set  
22 up a time for oral argument.

23 And if it can be on one of our dates here, as  
24 long as it doesn't delay it, I suppose if you want to  
25 submit it on the briefs, you know, we can certainly

1 consider that. But, we will set it up and give it some  
2 priority, so once the submission is made, we will get a  
3 date up with minimal delay here and get a decision out.

4 MR. ZIMMERMAN: I would venture a guess that  
5 everyone wants to have oral argument on it, Your Honor.  
6 It is a motion of some import to both sides.

7 The next item is the scheduling of the next  
8 conference, but I suspect before we get to that, you may  
9 want to ask if other people have matters they want to  
10 bring before the Court that may not have been part of  
11 the agreed agenda.

12 THE HONORABLE JUDGE DONOVAN FRANK: Well, we  
13 will do both. But, I think we have got, for the next  
14 live show, so to speak, we have the same time frame,  
15 June 21st -- I think there might have been some  
16 confusion. If there was, it was probably created by me,  
17 because I was scheduled to be gone, I think, on the  
18 21st, originally. So, I think, maybe without another  
19 consultation, again, I take responsibility. It was  
20 rolled back to June 20th. But, I think we are back now  
21 on the June 21st, so we will have the same time sequence  
22 as we have had in the last few meeting.

23 We haven't set a telephone conference  
24 call-in, yet, for the in-between time. Do you want to  
25 run that two weeks out?

1 MR. ZIMMERMAN: Probably two weeks from  
2 this --

3 THE HONORABLE JUDGE DONOVAN FRANK: From  
4 today?

5 MR. ZIMMERMAN: Yes. I think that would  
6 work.

7 THE HONORABLE JUDGE DONOVAN FRANK: I think  
8 that would be --

9 THE HONORABLE MAGISTRATE JUDGE BOYLAN: 31st.

10 MR. ZIMMERMAN: Is that Memorial Day?

11 MR. HOPPER: No, that is Monday the 29th.

12 MR. ZIMMERMAN: Will the 31st work for  
13 everyone? Okay, that will be the call-in conference on  
14 the odd two weeks. Would that be then at nine?

15 THE HONORABLE MAGISTRATE JUDGE BOYLAN: 8:00.

16 THE HONORABLE JUDGE DONOVAN FRANK: 8:00.

17 MR. ZIMMERMAN: 8:00 a.m..

18 THE HONORABLE JUDGE DONOVAN FRANK: I know it  
19 is hard to utter the word 8:00, Mr. Zimmerman, but it is  
20 not as hard as for those living on the West Coast.

21 MR. ZIMMERMAN: 8:00 a.m., May 31, is the  
22 call-in conference with Your Honors, and June 21st, 8:00  
23 a.m., for the pre-meeting, and 9:15 for the in-court  
24 proceeding.

25 THE HONORABLE JUDGE DONOVAN FRANK: And we

1 will put those dates up on the website.

2 MR. ZIMMERMAN: Yes. And I trust they will  
3 be in Minneapolis unless you tell us otherwise?

4 THE HONORABLE JUDGE DONOVAN FRANK: Yes.

5 MR. ZIMMERMAN: All right. Thank you, Your  
6 Honor. The next, and I guess the last item would be if  
7 anybody has anything further to add from things that are  
8 not on the agenda. Let's see if there are any  
9 questions.

10 Okay, I think this is something we probably  
11 want to take up in chambers, probably something, Ron  
12 gave me, about -- is there a motion -- I think there is  
13 a motion to dismiss pending on the Medicare Secondary  
14 Payment, Payor Act Motion, is there not? Has a motion  
15 been filed --

16 MR. PRATT: It has been pending for quite a  
17 while.

18 MR. ZIMMERMAN: Yes. And there is also a  
19 motion pending in that same issue in the Medtronic case  
20 before Judge Rosenbaum. And there was some thought that  
21 it was the same issue in both cases. The factual  
22 pattern really doesn't change.

23 And I know Judge Boylan and I had talked  
24 about maybe these would be heard at the same time,  
25 because they are the exact same issue, just being dealt

1 with in one courtroom and another. And the idea would  
2 be to perhaps coordinate that actual hearing so that  
3 they are heard at the same time, because we have got the  
4 same issue in the same district before two different  
5 courts in the exact same motion to dismiss.

6 I don't think we have to make a decision on  
7 that now, but I thing I want to plant that seed, because  
8 it is something we should give thought and consideration  
9 to.

10 THE HONORABLE JUDGE DONOVAN FRANK: Give us  
11 just a minute.

12 MR. ZIMMERMAN: Sure.

13 THE HONORABLE JUDGE DONOVAN FRANK: Our  
14 suggestion would be that, I mean, to me there are a  
15 couple of issues. One, it goes without saying, we will  
16 discuss it with Judge Rosenbaum. And there is more than  
17 just the issue of the one judge.

18 The other issue, which to me is a matter of  
19 timing and scheduling, and that is whether there should  
20 be any circumstance under which that should proceed in  
21 either case. For example, a preemption decision by the  
22 court and what is the reasonableness of a stay of a  
23 third-party payor case in the context of the rest of  
24 these cases, whether they are MDL's or not. I think  
25 whatever the proper answers are, because I have not had

1     that discussion, we haven't, with Judge Rosenbaum.

2                     And so, I think it goes without saying that  
3     we should, whether we all end up agreeing, meaning Court  
4     and counsel is another matter. But, the Court should be  
5     on the same page, and I think we can quickly and easily  
6     get there, actually.

7                     MR. ZIMMERMAN: And that was just why I  
8     dropped it on Your Honors is I think we need to just  
9     think about it and it be on people's radar screens,  
10    because those are important questions.

11                    THE HONORABLE JUDGE DONOVAN FRANK: One thing  
12    that I may have mentioned on the record some time long  
13    ago, and I am not suggesting it is related to the merits  
14    of these motions, but when those cases came into  
15    Minnesota, there was never a decision by either Judge  
16    Rosenbaum or myself that they are cases that will be  
17    consolidated, if you mean consolidated. We are all in  
18    this together. We try it together, as opposed to an  
19    administrative doctrine that most districts have called  
20    a related case doctrine, saying it makes sense from a  
21    judicial efficiency and coordination standpoint to have  
22    the same judge on the Medtronic case handling any  
23    third-party payor, and the same Judge -- because there  
24    has never been a decision by either one of us that we  
25    are going to roll them -- you know, because the word

1 consolidation means different things in different cases.

2           They are only assigned to us because --  
3 partly so that we could coordinate the timing of this to  
4 say, when is the proper time to hear these, and what  
5 involvement should they have? And so, we can -- we can  
6 discuss that and get something to you. Whether it is in  
7 letter form, or a short court order, or other  
8 communication, so that everybody will know that issue.

9           MR. ZIMMERMAN: Or, in the alternative, we  
10 could even be heard on it, and then you could decide how  
11 to handle it after you have heard each party's point of  
12 view.

13           My concern, of course, is that we know which  
14 way to go. And I raise it because Judge Rosenbaum's --  
15 that issue is a little riper there, because this one has  
16 been stayed here.

17           And if it is going forward there and you want  
18 it to heard at the same time, we have got to ramp this  
19 one up here in the Guidant case, because like I said,  
20 the question of law is a question of law and it  
21 shouldn't be decided differently or by different people,  
22 I guess.

23           MR. PRATT: Well, I feel a little sprung upon  
24 because I had no idea this was going to be up for  
25 discussion today. So, clearly I would like to be heard

1 on it. I think it is a whole lot more complicated than  
2 you've just heard. You know, I understand why the  
3 Plaintiffs -- you know, Mr. Zimmerman, sort of together,  
4 Medtronic and Guidant would say, it makes sense for us  
5 to have it resolved altogether.

6 I don't know that it makes sense from the  
7 Defense standpoint for it to be heard together. We may  
8 have different views on it. I have not talked to  
9 Medtronic about, does that make sense, or does it not  
10 make sense.

11 So, if this is a matter that is going to be  
12 considered, I would certainly like to be given enough  
13 notice so I can engage my colleagues in the Medtronic  
14 MDL to make a sort of, maybe, collective decision if we  
15 can reach it, of what we think ought to be done.

16 Clearly, we are not the tail wagging the dog,  
17 the Court is going to decide how they want to do it.  
18 But, I do think, though, it is a little bit more  
19 complicated, not just from a timing standpoint, but from  
20 a substantive standpoint than may be presented by Mr.  
21 Zimmerman.

22 So, as long as we agree to, let's leave it  
23 there, let's talk about it and think about it, and we  
24 will be heard on it.

25 THE HONORABLE JUDGE DONOVAN FRANK: Let's do

1 this. I think it would probably be accurate to say that  
2 if this wasn't on the radar screen, it is. I think the  
3 Medtronic case is ready to go, and has been  
4 substantially -- the briefing is in the process of being  
5 completed. I will talk to Judge Rosenbaum.

6 My commitment to everybody here is that there  
7 won't be any decision made procedurally or otherwise  
8 without input from counsel, meaning that if there was  
9 some administrative decision made by the Court that,  
10 well, maybe one judge, even if not at the same time, one  
11 judge should be hearing these, because it may will be  
12 that Guidant will take a peek at this and say, well, we  
13 are not going to take the same view that Medtronic does.

14 There is also an issue that, well, it  
15 presupposes that the same decision will be made in each  
16 case regardless of who the Judge is. I will talk to  
17 Judge Rosenbaum, and we will just promise what is the  
18 obvious. There won't be any procedural ambush of  
19 anyone.

20 Anything you want to say about that?

21 MR. ZIMMERMAN: It reminds me of the Yogiism  
22 that some of you have heard. It goes like this: I  
23 never said most of the things I said. So, I guess we  
24 will go back to, it is on your radar screen, the  
25 positions are wide open on how we are going to proceed,

1 but I just want the Court in both cases to know what is  
2 out there and how it can anticipate what our appropriate  
3 responses should be, once it is at least out there for  
4 everyone to understand.

5 THE HONORABLE JUDGE DONOVAN FRANK: Well,  
6 frankly speaking, even if Medtronic wasn't filed, you  
7 know what I am going to do when I get off the Bench or  
8 as soon as we get back? We are going to check to see  
9 what is the status of our motion and what outstanding  
10 requests, if any, do we have.

11 I mean, I will check that right away. I know  
12 we made some decisions early on administratively on the  
13 same judge taking -- because they didn't come in and  
14 get -- that decision wasn't made accidentally of a  
15 random assignment. We were just clear that, well, one  
16 isn't going to dictate the pace of another, because that  
17 could be unclear to clients or lawyers, because some  
18 people may be of the view that the two aren't entirely,  
19 apart from the Medtronic case, that there are separate  
20 issues.

21 We will take a look at it. It is on the  
22 screen. And we'll just promise to keep everybody  
23 informed. So, no decision gets made, and then you find  
24 out about something after the fact. All right?

25 MR. ZIMMERMAN: Any other? Gale?

1                   THE HONORABLE JUDGE DONOVAN FRANK: Come  
2 right up. Yeah, those orders are on my desk, I think.  
3 Go ahead.

4                   Maybe just note your presence for the record?

5                   MS. PEARSON: Good morning. My name is Gale  
6 Pearson and I am here representing individuals in  
7 Minnesota State Court. And I think our office has filed  
8 approximately six of the State Court cases. Two more,  
9 my understanding is, will be send back, as well.

10                  And we just wanted some clarification about  
11 role that Ms. Barrios is playing in negotiating our  
12 discovery time during depositions. My understanding  
13 through some e-mails is that Ms. Barrios' role was to  
14 collect data from the State Court proceedings, but she  
15 was not necessarily negotiating deposition times on  
16 behalf of the State Court attorneys in Minnesota, Joe  
17 Crosby may have additional comments to that.

18                  But, we have received no cross notices in any  
19 of the depositions scheduled in the Guidant cases thus  
20 far. And I think our position has always been  
21 consistent that we would like the Minnesota Civil Rules  
22 of Procedure to guide our depositions. We are  
23 interested, absolutely, in cooperating. We are not  
24 interested in duplicative questions. But, we still want  
25 to maintain the rights that our clients have under our

1 State Rules, to advocate for our clients and ask  
2 questions in our depositions. Thank you.

3 THE HONORABLE JUDGE DONOVAN FRANK: Thank  
4 you. Anybody want to respond to that?

5 MR. ARSENAULT: Your Honor, Dawn Barrios  
6 doesn't have any authority to do any negotiating.  
7 Essentially, the role she serves here and the role she  
8 has served in both the Propulsid MDL and the Vioxx MDL,  
9 is to act as a facilitator to bring problems to our  
10 attention, perhaps, to see if there are some  
11 accommodations that could be made.

12 The issue with regard to the cross noticing  
13 is always a thorny one. You know, the MDL lawyers  
14 negotiate a specific amount of time. And when we notice  
15 a deposition, that is the amount of time we want. If it  
16 gets cross-noticed, if the Defendants choose to cross  
17 notice it, essentially I think our position is they need  
18 to make arrangements with those attorneys to accommodate  
19 whatever additional time they need.

20 But, in the spirit of cooperation, there are  
21 some instance where if someone helps to facilitate, and  
22 if we know who the lawyers are, maybe we can give them  
23 some of our time. So, there is a negotiation process  
24 that takes place on a deposition by deposition, on a  
25 witness by witness basis. But, essentially, we start

1 from the premise that we have whatever time we are  
2 allotted, the seven hours, and if the Defendants decide  
3 they want to cross notice those depositions, they will  
4 have to makes arrangements with those state lawyers to  
5 decide how much extra time they get. That shouldn't  
6 impede the amount of time or adversely effect the amount  
7 of time that we've negotiated for depositions that we  
8 have noticed.

9 MR. PRATT: We need to sort this out. I  
10 mean, from the very first conference we had with Your  
11 Honor, I think there was a lot of discussion about the  
12 importance of coordinating with the State Court cases.

13 It is not unusual in an MDL for there to be  
14 an MDL-approved designee who is called the State Court  
15 coordinator.

16 THE HONORABLE JUDGE DONOVAN FRANK: True.

17 MR. PRATT: Who serves that role. I didn't  
18 pick Dawn Barrios. I mean, I didn't go to Dawn and say,  
19 I want you to be the State Court coordinator. She  
20 called me and said, I need a list of all of the State  
21 Court Guidant cases. My job is to kind of pay attention  
22 to what is going on and send me the cross notices. I  
23 don't know who gave her that authority. But, I would  
24 urge the Plaintiffs' Steering Committee to give Your  
25 Honor a designee to serve that role, so that person gets

1 blessed with judicial imprimatur of doing what we need  
2 that person to do.

3 We need somebody to negotiate this. I don't  
4 care if it is Gale, I don't care who it is, we will deal  
5 with anybody. But, I think there needs to be somebody  
6 who is a portal from here to the State Court litigants,  
7 so that we can resolve disputes, if we can.

8 I don't agree with Mr. Arsenault's view of  
9 the world in terms of they may get additional time. I  
10 don't think they need or get additional time. But, that  
11 is a matter we can try to resolve.

12 So, I think at the starting point, we need to  
13 have somebody either blessed by the Plaintiffs' Steering  
14 Committee and approved by you as the State Court  
15 coordinator, or we need to put a list of candidates up  
16 and you can pick one. I think we have to have someone  
17 immediately at this critical time as we are doing cross  
18 noticing of depositions. I thought they approved Ms.  
19 Barrios.

20 MR. ARSENAULT: We certainly don't have a  
21 problem with her. And she has served very capably in  
22 that capacity in two or three other MDL's. My point was  
23 that I think what I heard Gale Pearson say is that is  
24 there someone unilaterally deciding how much time we get  
25 or we don't get? And she is not serving in that

1 capacity. She is trying to be a facilitator, trying to  
2 negotiate. Certainly there will have to be input from  
3 the Plaintiffs' Steering Committee. There will have to  
4 be input from Defense counsel. She can't unilaterally  
5 dictate what time, additional time, or whether they will  
6 share part of the time, and she is currently serving and  
7 we are okay and endorse her as being the person who  
8 serves in that capacity. But, it is all subject to  
9 negotiations.

10 And I think in response to Gale's remarks,  
11 she is not going to unilaterally decide any of these  
12 issues. There is going to have to be some compromise  
13 and discussions about all of it.

14 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Well,  
15 why don't we leave it just at that? I mean, this is the  
16 first time that we have heard that this was a real  
17 problem. Obviously, it is a thorny issue. It is always  
18 a thorny issue. But, apparently everyone has been  
19 acting in good faith to work around those issues so far.  
20 And let's presume that that is going to continue.

21 I think you have made clear what Ms. Barrios  
22 role is. She is not the czar, but she is there to  
23 facilitate this good faith effort by the parties to make  
24 sure that you do not engage in some lengthy and wasteful  
25 duplication of efforts between the state and the federal

1 deposition and discovery process. And it sounds like it  
2 has been working.

3           So, rather than argue about what might be a  
4 problem, I am going to presume that it is not a problem  
5 until something comes up. And then you have to call me  
6 and find out whether or not what we are going to do on  
7 the MDL. But, other than that, I am going to presume  
8 Ms. Barrios is doing the job that she has been doing in  
9 the past, and that is not acting as Queen Elizabeth, but  
10 acting as a facilitator, okay?

11           MR. ARSENAULT: That is fine, Your Honor.

12           THE HONORABLE JUDGE DONOVAN FRANK: As Ms.  
13 Pearson is coming to the mike, I think to add a little  
14 bit to what Judge Boylan said, I think you can assume,  
15 especially when the lines of communication are wide open  
16 between the State Judges and the Federal Court. I can't  
17 speak for them and they can't speak for us.

18           But, we are both going to have a low  
19 tolerance for people behaving in a way that the same  
20 person is deposed over and over again. And so, if we  
21 look at two depositions and say, well, they asked  
22 exactly the same questions in exactly the same way.

23           I mean, I think a lot of this can be  
24 coordinated without compromising the role of individual  
25 lawyers or the State Rules or Federal Rules. I mean, I

1 think it can be unless everybody just stands their  
2 ground and --

3 MS. PEARSON: I would agree. And I know Ms.  
4 Barrios, and she is very, very competent at her job.  
5 And the only point that the State Court attorneys would  
6 like to make is that it was not our understanding that  
7 she was appointed to negotiate on our behalf.

8 That doesn't mean that we don't intend to  
9 cooperate with her, provide the data to her, and nor do  
10 we have any interest in asking duplicative questions.  
11 However, it worked very well in the Medtronic situation  
12 where we were entitled to seven hours, just like the  
13 Minnesota Rules of Civil Procedure allotted us. There  
14 was an order in place that prohibited duplicative  
15 questions. We honored that and it worked very smoothly  
16 and there were no complaints from either side. And I  
17 think Magistrate Boylan was involved in that process, as  
18 well.

19 And if there were any problems, let us know,  
20 but my understanding is that process went very smoothly.  
21 And I would agree that our time was different, separate  
22 from the MDL time, and it was in addition to the MDL  
23 time.

24 And I think that is the State Court position.  
25 And I don't know that anyone would compromise that

1 position.

2 MR. ARSENAULT: And very briefly, Judge, I am  
3 on the Medtronic PSC, and her representations regarding  
4 how that worked out are accurate. And that is exactly  
5 how it happened.

6 THE HONORABLE JUDGE DONOVAN FRANK: Okay.  
7 Mr. Zimmerman or anyone else want to take the stage?

8 Mr. Zimmerman?

9 MR. ZIMMERMAN: I move the meeting be  
10 adjourned.

11 THE HONORABLE JUDGE DONOVAN FRANK: Mr.  
12 Pratt?

13 MR. PRATT: I have got to second it.

14 THE HONORABLE JUDGE DONOVAN FRANK: Thank you  
15 all. Same place, same station. Be on guard for the  
16 courtroom. And was there a matter that someone needed  
17 to take up?

18 MR. ZIMMERMAN: Well, unless you wanted to  
19 talk more about the correlation of the MS --

20 THE HONORABLE JUDGE DONOVAN FRANK: Did we  
21 get it resolved? Just a half-hour ago, you said, well,  
22 there is a matter that we can't take up. We can take it  
23 up at a later time.

24 MR. PRATT: That was the coordination --

25 MR. ZIMMERMAN: That was the coordination of

1 the MSP, and I did take it up.

2 Your Honor, I beg your pardon. It was the  
3 Defendant fact sheet issue. And I think we are going to  
4 meet on that.

5 THE HONORABLE JUDGE DONOVAN FRANK: Okay.

6 (Adjournment.)

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Certified by: \_\_\_\_\_

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Jeanne M. Anderson, RMR-RPR  
Official Court Reporter

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